No. 85-1594

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, ETC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board reasonably concluded that the requirement of Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d), that a party must notify federal and state mediation services and then wait 30 days before implementing its final contract proposal or taking economic action, applies only to the party that initiated negotiations to terminate or modify an existing contract and not to the noninitiating party.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Fort Smith Chair Co., 143 N.L.R.B. 514, enforced *sub nom. United Furniture Workers* v. *NLRB*, 336 F.2d 732, cert. denied, 379 U.S. 838	9, 10
Hooker Chemicals & Plastic Corp., 224 N.L.R.B. 1535, enforcement denied, 573 F.2d 965	4, 5, 8, 9, 11
Local 219, Retail Clerks' Ass'n v. *NLRB*, 265 F.2d 814	10
Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270	9, 10
NLRB v. *City Disposal Systems, Inc.*, No. 82-960 (Mar. 21, 1984)	5
NLRB v. *J. Weingarten, Inc.*, 420 U.S. 251	9
NLRB v. *Lion Oil Co.*, 352 U.S. 282	9, 10
NLRB v. *Local Union No. 103, Iron Workers*, 434 U.S. 335	9
NLRB v. *Mar-Len Cabinets, Inc.*, 659 F.2d 995	9
Pattern Makers' League v. *NLRB*, No. 83-1894 (June 27, 1985)	5
Peoria Chapter of Painting & Decorating Contractors, 204 N.L.R.B. 345, enforcement denied, 500 F.2d 54	4, 7-8, 10
Weathercraft Co. of Topeka, Inc., 276 N.L.R.B. No. 52 (Sept. 24, 1985)	11

Statute: Page

National Labor Relations Act, 29 U.S.C. (& Supp. II) 151 *et seq.* 2
§ 8(a)(1), 29 U.S.C. 158(a)(1) 4
§ 8(a)(5), 29 U.S.C. 158(a)(5) 4
§ 8(d), 29 U.S.C. 158(d) 4, 5, 6, 7, 8, 9, 10
§ 8(d)(1), 29 U.S.C. 158(d)(1) 6, 7, 11
§ 8(d)(2), 29 U.S.C. 158(d)(2) 6
§ 8(d)(3), 29 U.S.C. 158(d)(3) 6, 7
§ 8(d)(4), 29 U.S.C. 158(d)(4) 6, 7, 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 779 F.2d 552. The decision and order of the National Labor Relations Board (Pet. App. C1-C15), including the decision of the administrative law judge (Pet. App. B1-B69), are reported at 274 N.L.R.B. No. 17.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1985. The petition for a writ of certiorari was filed on March 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. II) 151 *et seq.*, are set forth at Pet. App. D1-D6.

STATEMENT

1. Respondent United Artists Communications, Inc. (the Company)[1] operates movie theaters in southern California and Arizona (Pet. App. B6). Petitioner, the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of District 2, represents the Company's projectionists in those areas in two separate bargaining units (*id.* at B7-B9, C4).[2] The most recent contract covering both units was due to expire on January 31, 1982 (Pet. App. B9, C4).

On December 1, 1981, petitioner wrote to the Company requesting negotiations for a new contract to take effect upon the expiration of the southern California unit contract. In early summer 1981, peti-

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[1] The Company intervened in the court of appeals and accordingly is a respondent in this Court.

[2] The southern California employees are represented by District 2 and its constituent Locals 215, 297, 504, 521, 709 and 702. The Arizona employees are represented by District 2 and its constituent Local 294. Pet. App. B7-B9, C4.

tioner formally requested negotiations for a new contract in the Arizona unit. Pet. App. C4. The parties later entered into joint bargaining negotiations covering both units (they met 16 times over several months in 1982) (*id.* at B9-B10, C5). Although the parties reached agreement on some issues, they were unable to reach agreement on others, including the Company's proposal to reduce the number of projectionists, and proposals concerning wages and a "buy out" plan for employees whose jobs would be eliminated (*id.* at B14-B19, C5).

Following a bargaining impasse and notice to petitioner in September 1982, the Company unilaterally implemented its final contract offer covering the southern California unit on October 11, 1982. The same sequence obtained in Arizona, where the Company sent notice to petitioner in November 1982 and implemented its final offer on December 6, 1982. Petitioner immediately called a strike in each unit in response to the Company's implementation of its final offer (Pet. App. B9-B11, B19-B21, B24-B30, C5-C6). Neither petitioner nor the Company formally notified the Federal Mediation and Conciliation Service (FMCS) or state mediation agencies of the existence of a bargaining dispute until the Company gave written notice of the dispute to FMCS and to the appropriate state agencies on January 26, 1983 (*id.* at B11-B12, C6).[3]

2. Upon charges filed by petitioner, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the

[3] The FMCS had informally learned of the dispute shortly before November 1, 1982, and an FMCS mediator had unofficially participated in bargaining sessions in November 1982 and January 1983 (Pet. App. A7-A8).

Act, 29 U.S.C. 158(a)(5) and (1), by implementing its final offers without waiting for 30 days after providing notice of the dispute to federal and state mediation services. The Board overruled the administrative law judge. It concluded that the Company did not violate the Act and accordingly dismissed the complaint (Pet. App. C1-C15).

The Board held that petitioner, as the party initiating the bargaining for a new contract, bore the burden under Section 8(d) of the Act, 29 U.S.C. 158(d), of timely notifying state and federal mediation services of the existence of a bargaining dispute, and that petitioner's failure to do so did not preclude the Company from exercising its normal right to implement its last best offer following a bargaining impasse. In so holding, the Board overruled its decisions in *Peoria Chapter of Painting & Decorating Contractors*, 204 N.L.R.B. 345 (1973), enforcement denied, 500 F.2d 54 (7th Cir. 1975), and *Hooker Chemicals & Plastic Corp.*, 224 N.L.R.B. 1535 (1976), enforcement denied, 573 F.2d 965 (7th Cir. 1978). In those earlier cases, the Board had required a noninitiating party to wait 30 days following an untimely mediation notice before taking economic action (Pet. App. C3). Accepting the reasoning of the Seventh Circuit, which denied enforcement in both cases, the Board concluded that "the concept of shifting the burden of filing the 8(d)(3) notice of dispute to the noninitiating party in order to establish a uniform 30-day mediation requirement is a matter of policy that simply is not reflected in the statutory language of Section 8(d)" (Pet. App. C11). Rather, the Board agreed with the Seventh Circuit that "the wording of Section 8(d) and its legislative history indicate that the method Congress chose to serve the

purpose of facilitating the involvement of the mediation services 'was to assign to one party, the initiating party, a fixed and definite responsibility for notifying the mediation services' " (Pet. App. C12 (quoting *Hooker Chemical Corp.* v. *NLRB*, 573 F.2d at 970)).

3. The court of appeals affirmed the Board's order dismissing the complaint (Pet. App. A1-A22). The court agreed that the Board's construction is consistent with the language, legislative history, and policies of Section 8(d) (Pet. App. A11-A22).

ARGUMENT

Petitioner contends that the Board erred in holding that the Company was permitted to implement its final contract offer following the parties' bargaining impasse without first notifying federal and state mediation services and waiting at least 30 days thereafter before taking any action. As the court of appeals found, and as we show below, the Board reasonably concluded that the notice and 30-day waiting period requirement of Section 8(d) of the Act, 29 U.S.C. 158(d), applies only to the party initiating contract negotiations (in this case, the union), and thus the construction is entitled to acceptance. See *Pattern Makers' League* v. *NLRB*, No. 83-1894 (June 27, 1985), slip op. 5; *NLRB* v. *City Disposal Systems, Inc.*, No. 82-960 (Mar. 21, 1984), slip op. 6. There is no conflict in the circuits on this issue. Accordingly, review by this Court is unwarranted.

1. Section 8(d) of the Act provides, that, where there is in effect a current collective bargaining contract,

> the duty to bargain collectively shall * * * mean that no party to such contract shall terminate or

modify such contract, unless the party desiring such termination or modification—

> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof * * *;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract * * *;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes * * * provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later * * *.

The provisions of Section 8(d) thus establish a procedure for parties to follow in bargaining for a new or modified contract. First, the party desiring to negotiate a new contract (the initiating party) is required by Section 8(d)(1) to serve the initial bargaining notice on the other party (the noninitiating party). The initiating party is then required by Section 8(d)(2) and (3) to offer to bargain and to notify mediation services within 30 days after the initial bargaining notice required by Section 8(d)(1) if no agreement has been reached by that time. Finally, Section 8(d)(4) requires that the parties refrain from engaging in economic action or

changing the terms of the existing agreement at least until 60 days after the opening bargaining notice or until expiration of the contract, whichever is later. Thus, under normal operation the 60-day waiting period following the initial bargaining notice includes 30 days following a timely notice to the mediation services.

In this case, petitioner initiated the bargaining by serving a 60-day notice on the Company under Section 8(d)(1). Accordingly, petitioner was required by Section 8(d)(3) to notify federal and state mediation services of the existence of the bargaining dispute within 30 days after its notice to the Company. Petitioner failed to fulfill that statutory obligation. The Company met its obligation under Section 8(d)(4) of refraining from modifying the contract until long after the 60-day notice period and the expiration of the last agreement, and it then implemented its last offer only after having bargained in good faith to impasse. Applying the provisions of Section 8(d) in those circumstances, the Board concluded that petitioner's failure to invoke the mediation process during bargaining did not preclude the Company from taking otherwise lawful action (without notifying mediation services and waiting 30 days) when the Company had in all respects satisfied its obligations under Section 8(d)(4).

The Board explained that "it is evident from a fair reading of Section 8(d) that the notice burdens of that provision fall exclusively, in the words of the statute, on 'the party desiring such termination or modification'" (Pet. App. C11).[4] While acknowl-

[4] In *NLRB* v. *Peoria Chapter of Painting & Decorating Contractors*, 500 F.2d at 57-58, on which the Board expressly relied, the Seventh Circuit stated that:

edging that "the participation of the mediation services is clearly an important and principal policy interest embodied in Section 8(d)," the Board concluded that Congress chose to assure involvement of mediation services by expressly placing the burden of triggering that participation on the initiating party.[5] Pet. App. C11-C12.

2. Petitioner contends (Pet. 7, 9-10) that Congress placed the burden of notifying the mediation services on both parties,[6] relying on the Board's

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> [Section 8(d)] is clearly phrased in terms of a unitary sixty-day waiting period keyed to the notice provision of § 8(d)(1) or the expiration date of the contract, whichever occurs later. * * * There is no provision * * * for a bifurcated waiting period of thirty days following each of the two statutory notices when the notice to the mediators is untimely given.
>
> * * * * *
>
> Thus, once the noninitiating party has observed its duty to bargain collectively during the sixty-day period subsequent to receiving notice, it has fulfilled its duty under § 8(d), whether or not the initiating party has met its obligation under § 8(d)(3) to notify state and federal mediators.

[5] As the Seventh Circuit noted in *Hooker Chemicals & Plastics Corp.* v. *NLRB*, 573 F.2d 965, 969 (1978), "[i]n most situations, the initiating party will have a strong incentive to give timely notices," thereby serving the congressional policy of involving mediation services in bargaining disputes; therefore the Board "need not contort the statutory language" to place a notice obligation on the noninitiating party where "Congress did not so legislate."

[6] Petitioner alternatively contends (Pet. 8-9) that the "'party desiring * * * termination or modification'" (on whom Section 8(d) imposes the notice obligations) refers not to the party initiating negotiations but rather to the party that during the course of negotiations proposes actual changes in the renego-

change of position as support for that interpretation. It is well settled, however, that "[a]n administrative agency is not disqualified from changing its mind." *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335, 351 (1978). In doing so here, "the Board has reached a fair and reasoned balance upon a question within its special competence" and "has adequately explicated the basis of its interpretation." *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975). Its view is thus entitled to deference.

Petitioner's reliance (Pet. 10) on *NLRB* v. *Lion Oil Co.*, 352 U.S. 282 (1957), and *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956), for the proposition that Section 8(d) should not be interpreted literally is misplaced. Those decisions involved provisions of Section 8(d) that the Court found to be ambiguous.[7] Here, in contrast, the language of Sec-

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tiated contract—in this case the Company. The Board and the courts, however, are unanimous in the view that the "party desiring * * * termination or modification" refers to the party who starts the negotiating process by giving the initial bargaining notice, and that the mediation notice burden does not thereafter shift depending on the substantive positions taken by the parties during the negotiations themselves. See *United Furniture Workers* v. *NLRB*, 336 F.2d 738, 741 (D.C. Cir.), cert. denied, 379 U.S. 838 (1964); *NLRB* v. *Mar-Len Cabinets, Inc.*, 659 F.2d 995, 998 (9th Cir. 1981); *Hooker Chemicals*, 573 F.2d at 969-970. Indeed, it was precisely to avoid the confusion that such a rule would cause that Congress assigned a "fixed and definite responsibility" for performing the Section 8(d) notice functions to "the party who starts the process." *United Furniture Workers*, 336 F.2d at 741.

[7] *Lion Oil*, 352 U.S. at 287, 289-290, involved the interpretation of the phrase "expiration date" (of a contract) as used in Section 8(d)(4), specifically, whether that phrase could refer to a date specified for reopening and modifying the contract

tion 8(d) unambiguously places the burden to notify the mediation services on the initiating party. In *Peoria Contractors*, 500 F.2d at 57 n.2, the Seventh Circuit distinguished *Lion Oil* and *Mastro Plastics*, stating that "none of the ambiguities mentioned in the above citations are relevant to the issue presented in this case [] nor bar our reliance on the plain words of this aspect of the statute." [8] Moreover, here, unlike in *Lion Oil* and *Mastro Plastics*, reliance on the plain words of the statute would not frustrate the statutory purposes.[9] Thus, as the court

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as well as to its actual termination date. *Mastro Plastics*, 350 U.S. at 285-286, involved the question whether the limitation on "strike[s]" in Section 8(d) referred only to strikes "in relation to subjects of negotiation" or to strikes over employer unfair labor practices as well.

[8] Petitioner's reliance (Pet. 9) on *Local 219, Retail Clerks' Ass'n* v. *NLRB*, 265 F.2d 814 (D.C. Cir. 1959) and *Fort Smith Chair Co.*, 143 N.L.R.B. 514 (1963), enforced *sub nom. United Furniture Workers* v. *NLRB*, 336 F.2d 738 (D.C. Cir.), cert. denied, 379 U.S. 838 (1964), is also misplaced. In those cases the Board and the courts held that the failure of an *initiating* party to give a mediation notice and then wait 30 days before taking economic action violated Section 8(d). It was appropriate to find a violation in that situation because the initiating party had failed to fulfill an obligation that the statute clearly imposed. But, as we have shown, a noninitiating party has no such obligation under Section 8(d).

[9] In *Lion Oil*, 352 U.S. at 289, the Court concluded that, unless the phrase "expiration date" in Section 8(d)(1) were interpreted to include the date when a contract was subject to modification as well as when it was subject to termination, the statutory purpose of encouraging stable, long-term bargaining relationships would be frustrated. Similarly, in *Mastro Plastics*, 350 U.S. at 285-287, the Court concluded that interpreting the language of Section 8(d) providing for loss of employee status of participants in strikes conducted within the

explained in *Hooker Chemicals*, 573 F.2d at 970, in rejecting the same contention petitioner makes here (see Pet. 11-12):

> The restraint imposed on the initiating party may be viewed as an incentive to fulfill its statutory duty to give timely notice; the initiating party need only perform its statutory duty to avoid the restraint. Accordingly, we perceive no injustice in permitting the noninitiating party to use economic weapons after contract expiration even though the initiating party may be restrained from such actions as a result of its own defaults.[10]

60-day notice period to apply to unfair labor practice strikes, as well as economic strikes, would frustrate the bargaining process and handicap the employees during negotiations.

[10] There is no basis for petitioner's suggestion (Pet. 11 n.2) that the Board's rule will encourage parties to "jockey" for position to avoid being the initiating party. Once the appropriate notices have been given, the initiator has no different status in the negotiations than the noninitiator. There is thus no reason to engage in such "jockeying." *Weathercraft Co. of Topeka, Inc.*, 276 N.L.R.B. No. 52 (Sept. 24, 1985), did not involve any attempt to avoid initiator status for tactical advantage. Rather, the employer there initiated negotiations by sending a letter to the union, as required under Section 8(d)(1), but then took economic action without having notified the mediation services. As does petitioner here, the employer in that case sought to argue that it was not in fact the initiating party.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board

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